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SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

NO. 72-1716

IN THE MATTER OF PATRICK R. TAYLOR

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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STATEMENT OF CASE

The Petitioner, Patrick R. Taylor, was a practicing attorney in Martinsville, Morgan County, Indiana, on an Indiana license which was granted him by admission to the Bar of the State of Indiana on September 25, 1968. On March 21, 1973, the Indiana Supreme Court by an Order and Opinion, suspended the Petitioner from the practice of law in Indiana for two (2) years. At the evidentiary hearing in November of 1972, the Disciplinary Commission attempted to prove, and the Hearing Officer so found, that

a. the Petitioner willfully and knowingly advised his client to act in contravention to a court order;
b. the Petitioner willfully and knowingly suborned his client to commit perjury;
c. the Petitioner advised his client to seize and carry away the personal property of the client's husband to be held as involuntary security for the Petitioner's attorney's fee (in Indiana divorce proceedings, the husband is liable for the fee of the wife's attorney); and
d. the Petitioner communicated with and interrogated an opposing party, who was not represented by counsel.

The Petitioner subsequently filed a Petition for Review by the Indiana Supreme Court, pursuant to Indiana Admission and Discipline Rule 23 §15(a), which Petition was denied by the Indiana Supreme Court on March 21, 1973.

The Petitioner then filed a Petition for Stay of said suspension order until May 1, 1973, to allow the Petitioner adequate time to terminate his law practice, which petition was granted by the Indiana Supreme Court. In ruling upon said petition, the Indiana Supreme Court advised the Petitioner that its decision was final, and that no rehearing was available, since the review procedure cited above is the exclusive appellate procedure in Indiana disciplinary proceedings. The next day, April 10, 1973, the Petitioner filed a petition for permission to file a petition for rehearing, and attached thereto a petition for rehearing, and petition for oral argument, and a brief in support of the petition for rehearing. On April 25, 1973, the Indiana Supreme Court denied the petition for permission to file a petition for rehearing.

On May 15, 1973, Petitioner filed an Application for Stay of Order of Indiana Supreme Court in the Supreme Court of the United States. Respondent filed a Memorandum in Opposition to Petitioner's Application for Stay of Order of Indiana Supreme Court with this Court on May 29, 1973. On May 31, 1973, Mr. Justice Rehnquist denied Petitioner's request for stay. Subsequently, Patrick R. Taylor petitioned this Court for Writ of Certiorari to the Supreme Court of Indiana to which we direct the following brief in opposition to said petition.

REASONS FOR OPPOSITION TO THE WRIT

1. The Indiana Admission and Discipline Rules and the administration thereof are not violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. In substance, the Petitioner argues that license revocation procedures for Indiana attorneys differ from procedures for barbers, beauticians, etc. He says that statutory proceedings under Indiana's Administrative Adjudication and Court Review Act are more elaborate than the procedure promulgated by rule of the Indiana Supreme Court in the discipline of members of its Bar. With these contentions, the Respondent concurs. However, the Petitioner's assertion that an attorney sought to be disciplined has no opportunity for an adversary judicial proceeding by which to challenge and review the disciplinary hearing and findings, is inaccurate. That opportunity is afforded a respondent in disciplinary proceedings if he can show the Indiana Supreme Court that there was error at the trial level, and such appeals have been and are being allowed. Admission and Discipline Rule 23 §15, Ind. Ann. Stat. (Special Supp. 1971). Admission and Discipline Rule 23 was promulgated by the Indiana Supreme Court in 1971. The Indiana Supreme Court made careful studies of the disciplinary procedures in use in other states and incorporated in Admission and Discipline Rule 23 only those procedures from other states that had proved just and workable.

Piercing the form and going to the substance of such a scheme, it works much like standard appellate procedure used by almost all state and federal courts. The idea that a judicial tribunal sitting in an appellate capacity (in substance, although the Indiana Constitution gives our Supreme Court original jurisdiction in matters of attorney discipline) is compelled, by the Equal Protection Clause, to hear every appeal filed regardless of the merits of such an appeal is frivolous and would unconscionably burden the proper administration of justice in the states.

Admittedly, lawyers are subject to a different license revocation procedure than some other professions in Indiana. The other professions alluded to by the Petitioner are subject to a statutory procedure, the Administrative Adjudication and Court Review Act. There is no question that said procedure is a legitimate exercise of the state's police power.

The reason that Indiana attorneys are subjected to a different body of rules in this respect lies at the foundation of a republican form of government: the separation of powers into executive, legislative, and judicial branches. The Indiana Constitution gives to our Supreme Court, not to our legislature, the exclusive power to discipline members of its Bar, State ex rel. Indiana State Bar Ass'n. v. Moritz, 244 Ind. 156, 191 N.E.2d. 21 (1963); In re Petition of Leach, 134 Ind. 665, 34 N.E. 641 (1893); but it does not give the judiciary the inherent power to discipline other professions. As long as

such procedure is fair, and is not administered in an arbitrary or capricious manner (which is normally a Due Process, not an Equal Protection, test), the Respondent submits that such is also a rational and legitimate exercise of a state's police power, reserved to it by the Tenth Amendment to the Constitution of the United States. This test of a rational means to a legitimate exercise of police power has traditionally been invoked by this Court where the so-called "suspect classifications" impairing a "fundamental right" protected by the Federal Constitution are not involved. (citations omitted) The Respondent submits that the practice of law is a privilege which should be exercised only by those whose integrity and ethical behavior measure up to the high public trust which they are afforded; it is not a vested or natural right. In re Holovachka, 245 Ind. 483, 198 N.E.2d. 381 (1964). But even if the practice of law should be considered such a "fundamental right" requiring a necessary means to a compelling state interest, the Respondent contends that the procedure promulgated by the Indiana Admission and Discipline Rules is necessary to the accomplishment of such a compelling state interest:

> "The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded

makes justice possible, for only through law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct."

---Preamble, Code of Professional Responsibility for Attorneys at Law, Ind. Ann. Stat. (Special Supp. 1971).

"Each person granted the privilege to practice law in this State has the obligation to conduct himself at all times in a manner consistent with the trust and confidence reposed in him by this Court and in a manner consistent with his duties and responsibilities as an officer or judge of the courts of this State. This Court has exclusive jurisdiction of all cases in which an attorney who is admitted to the Bar of this State (hereinafter referred to as 'attorney') is charged with misconduct. The procedures hereinafter set forth shall be employed and construed to protect the public, the court and the members of the Bar of this State from misconduct on the

part of attorneys and to protect attorneys from unwarranted claims of misconduct." (emphasis added)
---Indiana Admission and Discipline Rule 23 §1, General Principles, Ind. Ann. Stat. (Special Supp. 1971).

As alluded to above, the exclusive classification of attorneys (as opposed to other professions) subject to the disciplinary rules is necessitated by our form or republican government as expressed in the Indiana Constitution, and by the traditional Anglo-American concepts of judicial authority. The compelling state interest is, as expressed above, the vital need to protect the public and the courts from those who do not adhere to minimum standards of conduct.

Viewed in its proper perspective, the Indiana disciplinary procedure does not discriminate among classes of persons invidiously, and is crucial to the proper administration of justice. Therefore, it is not violative of the Equal Protection Clause.

2. Due process of law does not require proof "beyond a reasonable doubt" in a state disbarment proceeding. Petitioner's contention is without merit, for the reference in, In re Ruffalo, 390 U.S. 544, 88 S. Ct. 1222, 20 L.Ed.2d. 117 (1968), that a disbarment proceeding is a quasi-criminal action is directed to the issue of notice to the respondent (Mr. Ruffalo) of charges brought against him and the due process requirements relating thereto.

The court held that charges brought against an attorney must be made known to him before the hearing stage commences in order to give the Respondent an opportunity to explain and defend; the charges cannot be initially raised or amended during the hearing. It was to this issue that the court was referring when it stated that disbarment proceedings are quasi-criminal in nature. The standard of proof required in such proceeding was not even in issue in the Ruffalo decision and therefore, this case did not, either expressly or by implication, hold that the standard of proof in disbarment proceedings is to be beyond a reasonable doubt rather than by a preponderance. Section 14(d) of A.D. Rule 23, is not, therefore, unconstitutional nor contrary to the Ruffalo holding.

3. The Indiana procedure for the discipline of attorneys is not violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Petitioner contends, in essence, that the Indiana disciplinary procedure does not afford an attorney sought to be disciplined a "meaningful" opportunity to be heard in the above-mentioned review procedure.

In reply, Respondent submits that an attorney does have an adequate and "meaningful" opportunity to have his case reviewed by the Indiana Supreme Court under this procedure, for the following reasons; to-wit: that in substance the review procedure is akin to standard appellate practice, and moreover, is necessary to the

proper administration of justice. This procedure has not been, nor does Petitioner claim that it was, administered in an arbitrary or capricious manner; and, it is not only rational and legitimate, but it is necessary to a compelling state interest.

This Court's leading decisions on Due Process requirements in disciplinary proceedings are found in Spevak v. Klein, 385 U.S. 511 (1967), and In re Ruffalo, 390 U.S. 544 (1968), although Ruffalo, supra, has been construed to apply only to federal disciplinary proceedings (see Mr. Justice White's concurring opinion at page 552). Spevak, supra, held that the Fourteenth Amendment Due Process Clause prohibited a state from compelling an attorney to render evidence against himself through a subpoena duces tecum, invoking the Fifth Amendment privilege against self-incrimination in state disciplinary proceedings. To that extent, the state proceedings were deemed "quasi-criminal". Ruffalo, supra, held that a reciprocal federal disbarment was erroneous where the state proceeding upon which it was based had not afforded the attorney sought to be disciplined adequate notice of some charges of misconduct brought against him during the evidentiary trial, which charges were eventually used as a basis for disbarment in the state court. Ruffalo requires adequate notice of charges of misconduct prior to trial, and an adequate opportunity to explain and defend, and confront and cross-examine witnesses at trial.

Even though Ruffalo applies to federal proceedings [this Court denied certiorari

of the state disciplinary proceeding against Ruffalo at 379 U.S. 931 (1964)], the Indiana rules, on their face and as administered more than comply with those requisites, and Petitioner has made no assertion that they do not, in his application to this Court for stay. In fact, the Indiana procedure for the discipline of attorneys provides a review process not dissimilar to that of this Court (Rule 8, Rules of the United States Supreme Court) in disciplinary matters, where there is no hearing as of right, but rather a show cause rule. A distinction is that in Indiana proceedings the burden remains with the Disciplinary Commission, whereas, in this Court, the opposite is the case. Of course such federal proceedings are bound by the Fifth Amendment and Sixth Amendment.

Petitioner contends that In re Noell, 93 F.2d. 5 (8th Cir. 1937) (hereinafter referred to as Noell) held that, in a proceeding similar to Indiana's disbarment proceeding, Mr. Noell was denied due process of law because he appeared before a lower court instead of the State's Supreme Court. Petitioner failed to note that the Federal Court actually held that the use of the state decision when obtained through said means would be in violation of due process if said decision was the sole basis for the federal disbarment. The court further held that:

> "This court, of course, has no right to review the proceeding in the state court. Nothing that has been said in this opinion is in any way to be regarded as a criticism

> of the procedure adopted by that court of of the final conclusion reached by it...We have made an intrinsic examination of the procedure followed by the state court, as we are required to do, for the sole purpose of determining whether it was such that the order of suspension entered by the state court may be regarded by us as sufficient ground for striking the name of respondent from the roll of counsel of this court. (emphasis added)
> In re Noell, Id. at 7.

In an almost identical situation to that presented here, the court denied certiorari to the Supreme Court of Ohio, In re Ruffalo, 379 U.S. 931 (1964). The Ohio disciplinary procedure was similar to that in Indiana today.

> "In cases of this kind, the board of commissioners acts for and on behalf of this court. In doing so, it makes recommendations as to the facts which should be found and the action which should be taken by this court. However, this court has full responsibility for determining what the facts are and what action should be taken on those facts."
> Mahoning County Bar Association v. Ruffalo, 176 Ohio St. 263, 199 N.E.2d. 396, 396.

In denying certiorari to the Supreme Court of Ohio this Court indicated that a statutory delegation of powers by a state supreme court is not in and of itself a violation of due process as long as the accused is given sufficient notice of the charges against him and an opportunity to be heard.

The Petitioner also contends, sans citation, that the imposition of a greater penalty (two-year suspension) than that recommended by the Hearing Officer (public reprimand) is violative of the Due Process Clause. In support of the action of the Indiana Supreme Court in this instance, the Respondent would quote from the Preliminary Statement of the Code of Professional Responsibility for Attorneys at Law, Ind. Ann. Stat. (Special Supp. 1971), which is the same statement adopted by the American Bar Association in its Code of Professional Responsibility:

> "The Disciplinary Rules ... are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of a fair trial, the Disciplinary Rules should be applied to all lawyers, regardless of the nature of their professional activities. The code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct. The severity of judgement

> against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances." (emphasis added)

The Respondent would also cite Note, 43 Cornell L.Q. 489, 495 (1958), wherein it is stated:

> "There is generally no prescribed discipline for any particular type of improper conduct. The disciplinary measures taken are discretionary with the courts, which may disbar, suspend, or merely censure the attorney as the nature of the offense and past indicia of character may warrant."

and People ex rel. Karlin v. Culkin, 248 N.Y. 465, 480, 162 N.E.2d. 487, 493 (Cardozo, J.), wherein it is stated:

> "If the house is to be cleaned, it is for those who occupy and govern it rather than for strangers to do the noisome work."

CONCLUSION

The Respondent, the Disciplinary Commission of the Supreme Court of Indiana, respectfully requests this honorable Court to deny Petitioner's request for a writ of Certiorari to review the judgement of and opinions of the Supreme Court of Indiana.

Respectfully submitted,

s / Paul H. Buchanan, Jr.
Vice-Chairman
Indiana Supreme Court
Disciplinary Commission

s / John B. Ramming
Executive Secretary
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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing "Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Indiana" were mailed in the United States first class mail, postage prepaid, and addressed to Mr. Craig Pinkus, Goodman and Pinkus, 1125 Circle Tower Building, Indianapolis, Indiana 46204, this 11th day of July, 1973.

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